No. 5020

United States Circuit Court of Appeals for the Ninth Circuit

EVERETT FRUIT PRODUCTS CO., a corporation,
Plaintiff in Error,
vs.
OSCAR HOFFMAN, ELWOOD C. BOOBAR and FRED S. GREENLEE, copartners, doing business under the firm name and style of HOFFMAN & GREENLEE,
Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE GEORGE M. BOURQUIN, *Judge.*

Brief of Plaintiff in Error

WILLIAMS & DAVIS,
Commerce Bldg., Everett, Washington
REAMES & MOORE,
Dexter Horton Bldg., Seattle, Washington
Attorneys for Plaintiff in Error.

No. 5020

United States Circuit Court of Appeals for the Ninth Circuit

EVERETT FRUIT PRODUCTS CO., a corporation,
Plaintiff in Error,
vs.
OSCAR HOFFMAN, ELWOOD C. BOOBAR and FRED S. GREENLEE, copartners, doing business under the firm name and style of HOFFMAN & GREENLEE,
Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE GEORGE M. BOURQUIN, *Judge.*

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

This was an action brought by the Defendants in Error, wherein they claimed that by two certain written contracts, executed in August, 1924, they agreed to buy and Plaintiff in Error agreed to sell "subject to approval of sample," a quantity of canned sub-standard pears "to be of the 1924 pack

of pears as packed by the defendant" (Plaintiff in Error), at an agreed price; that the Plaintiff in Error failed to submit or tender samples, and that the Defendants in Error were thereby damaged in an amount equal to the difference between the contract price and the market price, and that said difference was the sum of Four Thousand Dollars ($4000.00) (Tr. p. 2, 3, 4).

The Plaintiff in Error claimed that the said two written agreements for the sale of pears "subject to approval of sample" were, by virtue of said quoted provision, lacking in mutuality (Tr. p. 118); that, aside from said question, there was no breach (Tr. p. 10), and no damage (Tr. p. 11); that Plaintiff in Error in 1924 packed or canned pears of the grade called "Sub-Standard," being of the grade covered by said agreements, and sent samples thereof to Defendants in Error for inspection; that Defendants in Error inspected the pack of substandard pears at the plant or factory of Plaintiff in Error at Everett, and also inspected the samples sent to them, but rejected and refused both, and failed and refused to order the delivery of such pears (Tr. p. 11, 12).

The cause came duly on for trial before a jury which was impanelled and sworn (Tr. p. 14). From the evidence it appeared that Plaintiff in Error, in 1924 and prior and subsequent thereto, was engaged in the business of canning fruits and vegetables (Tr. p. 77). On its behalf evidence was adduced to the

effect that in 1924 it packed a grade of pears conforming to the specifications of the Northwest Canners' Association for sub-standard pears, and that its pack of that grade was uniform throughout the season (Tr. pp. 77, 78, 84, 93).

This pack was examined some time in August, at the plant of the plaintiff in Error, in Everett by Mr. Longwell (Tr. pp. 84, 91, 93, 97). Mr. Longwell was making the inspection at that time as the agent of the California Packing Corporation, the owner of the "contracts" sued upon, (Tr. p 90), which had been assigned to it by Hoffman & Greenlee (Tr. p. 89). Testimony on both sides indicated that Mr. Longwell refused to approve these pears inspected in August (Tr. pp. 84, 92).

Again in October, 1924, Mr. Longwell called at the Everett plant, but refused to make further inspection (Tr. pp. 86, 87, 91, 92, 100), although the Plaintiff in Error offered such inspection to him (Tr. p. 86).

In the meantime, in September, 1924, Plaintiff in Error, sent samples of its sub-standard pears for inspection to Zinn & Co., the broker who had acted between the parties. These samples were received and inspected by the Defendants in Error (Tr. pp. 53, 64), and were by them rejected (Tr. pp. 54, 65).

There was some evidence adduced on behalf of Defendants in Error, in their case in chief, tending to show that the samples of pears inspected at the Everett plant in August, 1924, and the samples sub-

mitted in September, 1924, were not of the grade known as sub-standard (Tr. pp. 64, 68, 72, 74). On the other hand there was some evidence adduced on behalf of Plaintiff in Error, tending to show that the samples of pears inspected at the plant in August, and the samples inspected in September, and also the pears which Mr. Longwell refused to inspect in October, were of the grade designated as sub-standard (Tr. pp. 78, 84, 87, 92, 93, 94).

There was testimony on behalf of the Plaintiff in Error that the samples submitted for inspection were from its *regular sub-standard pack for that year,* and of the same quality and grade as the rest of its sub-standard pack (Tr. p. 84). This testimony was not contradicted.

Although there was evidence to the effect that Defendants in Error expressed their disapproval of the samples submitted, there was no evidence that they, at any time, ordered from the Plaintiff in Error, or demanded shipment by it, of any of its 1924 pack of pears.

The parties to the action offered conflicting testimony as to the market price of pears at the time of the alleged breach (Tr. pp. 66, 85).

Witnesses for the Defendants in Error testified that the "contracts" *had been assigned* to the California Packing Corporation, which was the owner thereof (Tr. pp. 89, 90, 67, 69). The price for which said "contracts" were sold was not stated in the testimony.

At the conclusion of the case in chief of the Defendants in Error a motion for non-suit was interposed by the Plaintiff in Error and was by the court denied, and exception noted (Tr. pp. 15, 76).

Thereupon Plaintiff in Error proceeded to introduce testimony in support of its defense (Tr. p. 15).

Over the objection of Plaintiff in Error, the court permitted the witness F. B. Wright to be cross-examined relative to a shipment of pears to London, and contracts for shipment to California Packers Corporation, not involved in this action (Tr. pp. 87, 88).

After Plaintiff in Error had rested, the Defendants in Error introduced evidence in rebuttal.

Over objection, the court permitted Defendants in Error to introduce in rebuttal testimony by W. B. Longwell of the market value of pears at the time of the alleged breach (Tr. p. 102); and to introduce in rebuttal testimony by Robert D. Frey of the quality or grade of the samples submitted and of the market price (Tr. pp. 107, 109, 110, 111); and to introduce in rebuttal testimony by R. G. Weston concerning a shipment to London, not involved in this action, and concerning the condition or quality of said shipment and a controversy arising therefrom (Tr. pp. 111, 112, 113); and to introduce in rebuttal testimony by John L. Jacobs concerning the grade or quality of the samples submitted and concerning market price (Tr. pp. 104, 105, 106, 107).

Upon conclusion of all the testimony the Plaintiff in Error moved for a directed verdict upon certain specified grounds (Tr. pp. 117, 118, 119) and presented certain requested instructions (Tr. pp. 121, 122, 132, 133), being requested instructions numbered 1 to 8 respectively (Tr. pp. 122, 123, 124, 125).

Counsel for Plaintiff in Error argued the motion for a directed verdict, whereupon counsel for Defendants in Error stated to the court: "Since counsel for defendant has moved for a directed verdict, I, at this time join in the motion for a directed verdict and ask your Honor to decide the case and not submit to the jury any question *except* the *question* of damage."

The court then denied the motion of the Plaintiff in Error, granted the motion of the Defendants in Error, held that the latter were entitled to recover and submitted the sole question of damages to the jury (Tr. p. 121) upon the instructions given by the court (Tr. p. 125 to 130).

Thereafter verdict was returned for Defendants in Error, judgment was entered, motion for new trial was interposed by the Plaintiff in Error, and the said motion denied by the court.

ASSIGNMENTS OF ERROR.

II.

The court erred in the admission of the following evidence offered by the plaintiff on cross-examination of the witness, F. B. Wright, a witness for the defendant, which said evidence on cross-examination was objected to by the defendant on the ground that it was irrelevant, immaterial and not proper cross-examination. On cross-examination the said witness testified in substance over the objection of the defendant that the defendant corporation shipped a lot of fruit to London in 1924 and that the defendant had a contract in the fall of 1924 for delivery of sub-standard pears of the 1924 pack to California Canners Corporation of California.

IV.

The court erred in the admission of the testimony of W. B. Longwell, a witness on behalf of the plaintiffs, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief, which said testimony was not proper rebuttal testimony and was in effect as follows:

> "I am familiar with the market price of this grade of pears in the State of Washington and along the Pacific Coast between the 1st of September and the 8th of October, 1924. The going market price for No. 2½ sub-standard pears sold at Everett, Washington, for fall delivery in the 1924 pack on or about October

1, 1924, was $2.85 factory or about $2.90 steamer. After October the price remained about at $2.85 to $2.90 level. It was about in September, in the packing season of 1924 that the price reached $2.85 or $2.90, that is, the early part of September somewhere around the first to the 5th of September."

V.

The court erred in the admission of the testimony of Robert D. Frey, a witness on behalf of the plaintiffs, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief, which said testimony was not proper rebuttal testimony and was in effect as follows:

"I have been engaged for the last eleven years in buying and selling pears and keeping posted on the market and am qualified in determining grades. At the request of the officers of California Canners I made an examination of four samples of No. 2½ cans substandard pears offered by W. C. Zinn to the California Canners. One case cut was evidently not packed as substandard at all but contained a syrup two grades higher and evidently a mistake. The balance were not suitable for the grade, with the exception of one can which was, I should say, just about passable. Taken as a whole the samples examined were not substandard pears as said term is understood in the trade on the Pacific Coast. My recollection is that the market price for substandard pears on or about September 12, 1924, was in the neighborhood of $2.80 to $2.85 F. A. S. steamer Everett, Washington. Between September 12, 1924, and October 18, 1924, the market had advanced prob-

ably five to ten cents a dozen. The highest and lowest market value of the said pears between the said dates was $2.80 and $2.95."

VI.

The court erred in the admission of the testimony of R. G. Weston given by deposition and offered on behalf of plaintiff, upon the ground that said testimony referred to a London shipment and to a matter of compromise and a controversy based on examination and inspection in London or Liverpool which said testimony was to the following effect:

"I am associated with Powell Bros. & Company of London in the business of canned goods. In the fall of 1924, Powell Bros. & Company purchased 5000 cases second standards—2½ second standards, pears, from Dodwell & Company, who acted through Meinrath, Corbaley & Co. from Everett Fruit Products Co. Under that contract deliveries of canned pears were made at London. I examined some of the contents of that shipment for quality. The size of the fruit varied enormously. In several tins we found one or more pears which were so soft that they were in a state of mush. Furthermore, a large number of pears had pieces cut out of them to remove a damaged portion and even some pears had a hole drilled right through them to remove such damaged portion. 15,000 cases were shipped (30) from the Pacific Coast by the steamship 'Urania,' of which 1,000 cases were landed in London and 500 cases were transshipped from London to Liverpool. The remaining 296 cases were shipped from the Pacific Coast by the Steamship 'London Shipper.'

The examination of the samples drawn at London, that I made, was in my usual course of business there."

VII.

The court erred in the admission of the testimony of John L. Jacobs, a witness on behalf of the plaintiff, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief, which said testimony was no proper rebuttal testimony, and was in effect, as follows:

After giving testimony tending to show the qualifications and knowledge, the witness testified in substance: "I was present at the examination of samples, represented to be 'substandard' pears, packed by the Everett Fruit Products Company, submitted by Walter C. Zinn to our company. This examination was held in the office of M. Feibush, in San Francisco, in the presence of Robert Frey of the California Canneries Company, Mr. Feibush and myself. These samples were examined on two dates, on September 15th and September 25, 1924. The samples submitted, in our opinion, were not up to the grade of 'Substandard' pears. Most of the samples submitted contained a very large percentage of mushy, soft, broken fruit, which is absolutely unfit to be put into grade of 'Substandard' and belongs in the 'Pie' grade. Also a considerable number of halves in the samples submitted showed holes right through the center of the pears, making those particular halves unfit for the grade of 'Water' pears. The effect of the presence of such fruit in the samples submitted would render the sample unfit for the grade of 'Sub-standard' pears and unacceptable as such.

It is my recollection that the market value of 'Substandard' pears about the middle of September, 1924, had advanced very considerably from the market of the prior months of that year, and was somewhere in the neighborhood of $2.85 per dozen, F. A. S. steamer, at the Northwest, including Everett, Washington. The market value was thoroughly sustained between the dates of September 12, 1924, and October 18, 1924, and, if anything, was rising slightly. It is my recollection that the market value of No. 2½ 'substandard' pears, in the Northwest, including Everett, Washington, F. A. S. steamer, between September 12, 1924, and October 18, 1924, was between $2.85 and $2.90 per dozen."

VIII.

The court erred in denying the motion of the defendant, which was interposed at the conclusion of the plaintiffs' testimony in support of their case in chief, by which said motion the defendant challenged the sufficiency of the evidence produced on behalf of plaintiffs to sustain any verdict or judgment and moved the court for its order granting a non-suit of the plaintiffs' case, for the reasons:

a. That plaintiffs' testimony failed to show that plaintiffs were the real parties in interest.

b. That the agreements involved in the case were executory agreements without present consideration, of an optional character, and lacking in mutuality, and of no legal force and effect.

c. That the plaintiffs' testimony failed to show that any pears were ever ordered by the plaintiffs pursuant to the contract.

d. That plaintiffs' testimony tended to show a resale of the pears to another corporation, and did not show any loss or damage to the plaintiffs.

IX.

The court erred in denying the motion of the defendant for a directed verdict for the defendant, which said motion was interposed at the conclusion of all of the testimony, in the case, and was upon the following grounds, to-wit:

a. That it appeared from the plaintiffs' testimony that the contract sued upon had been assigned to the California Canneries Association, which was and is the owner of the contract, and that the plaintiff in this cause is not the real party in interest herein.

b. That if of the plaintiffs are entitled to recover, the measure of their damages would be the difference between the contract price and the subsale price and would be limited to that, and that there is no evidence of any damage whatsoever suffered by plaintiffs.

c. That the contract sued upon was not supported by any present consideration that it was an unilateral agreement and of no legal binding effect.

X.

The court erred in granting the motion of the plaintiffs for a directed verdict and withdrawing from the consideration of the jury all questions save that of the amount of damages, for the following reasons:

a. The motion of the plaintiffs was a qualified and conditional motion, which asked for the determination of the jury on the question of damages.

b. That the defendant had submitted and requested the court to give special instructions on its behalf.

c. There was a disputed issue of fact as to whether the samples furnished conformed to the specifications of the agreements and as to whether the defendant had breached any covenant of the agreement.

XI.

The court erred in granting the motion of the plaintiff for a directed verdict and in ruling and deciding that plaintiffs were entitled to recover, and directing the jury to return a verdict for the plaintiffs, for the reasons:

a. That the plaintiffs were not the real parties in interest inasmuch as their testimony affirmatively showed that the agreements of purchase of pears had been assigned.

b. The agreements involved in the case were executory agreements without present consideration, of an optional character, and lacking in mutuality and of no legal binding force or effect.

c. The evidence showed that the plaintiffs had never approved any samples and had never ordered any pears, and that there was no breach of the agreements by the defendant.

d. The evidence showed that the defendant had performed whatever covenants of the agreements, if any, it was obliged to perform.

e. The court reached its decision without considering or determining the fact whether the samples of pears conformed to the specifications of the agreements.

f. That the testimony failed to show any damage suffered by the plaintiffs, and, therefore, failed to show any right of recovery by the plaintiffs.

XII.

That the court erred in refusing to give to the jury the defendant's requested instruction No. 1, as follows:

> "You are instructed if you find from the evidence that the pears purchased from the defendant by the plaintiffs were purchased for the purpose of resale and that the defendant knew that said pears were purchased for the purpose of resale and that said pears were resold by said plaintiffs to the California Packing Company, then you are instructed that the measure of damages in this case is the difference between the contract price and the price of such resale, and there being no evidence in this case of the resale price, you shall find for the defendant."

XIII.

That the court erred in refusing to give to the jury the defendant's requested instruction No. 2, as follows:

"You are instructed that under the contract made between the plaintiffs and the defendant for the sale of pears the plaintiffs agreed to purchase from the defendant substandard pears of defendant's 1924 pack 'subject to the approval of plaintiffs,' and if you find from the evidence in this case that the said defendant submitted to the plaintiffs fair samples of its 1924 pack of substandard pears as packed by said defendant and that said plaintiffs failed and refused to approve said samples, then there was no sale and you shall find for the defendant."

XIV.

The court erred in refusing to give to the jury the defendant's requested instruction No. 3, as follows:

"You are instructed that under the contract between the said plaintiffs and defendant for the sale of pears as alleged in the complaint herein it is provided that such sale is 'subject to approval of samples' and if you find from the evidence in this case that the defendant submitted to the plaintiffs sample cans of pears and that such samples submitted were of the grade known as 'sub-standard pears' and that the plaintiffs failed and refused to approve such samples so submitted, then there was no sale and you shall find for the defendant."

XV.

The court erred in refusing to give to the jury the defendant's requested instruction No. 4, as follows:

"You are instructed that under the contract between the plaintiffs and the defendant

the plaintiffs purchased from the defendant pears 'subject to approval of sample' and it was the duty of defendant under such contract to submit to the plaintiffs samples of sub-standard pears of its 1924 pack and the obligation was upon the plaintiffs to approve or reject such samples, and if you find in this case from the evidence that such contract as set forth in the complaint herein were assigned to the California Packing Company or that the pears covered by said contract were resold to the California Packing Company and that the plaintiffs delegated to a representative of the California Packing Company the duty to inspect said pears and to reject or approve such pears, then you shall find for the defendant for the reason that said plaintiffs under said contract had no right to delegate the authority to any other person or persons."

XVI.

The court erred in refusing to give to the jury the defendant's requested instruction No. 5, as follows:

"You are instructed that if you find from the evidence that the defendant submitted to the plaintiffs samples of canned pears which samples could be properly graded according to the grades known and established among the trade in the Pacific Northwest as sub-standard pears, and that said plaintiffs rejected or refused to approve such samples, then you shall find for the defendant and it makes no difference for the purposes of this instruction whether such sub-standard pears were good, bad or indifferent so long as they were sub-standard pears."

XVII.

The court erred in refusing to give to the jury the defendant's requested instruction No. 6, as follows:

> "You are instructed, if you find from the evidence that the plaintiff had made a subsale to the California Packers' Corporation, or any other person, of the pears described in the contracts in this case between the plaintiff and the defendant, and if you further find the plaintiff is entitled to recover damages from the defendant for such failure, then in ascertaining such damages, you are hereby instructed that if you find that such subsale was made, as hereinabove mentioned, then the plaintiff would not be entitled to recover any more than nominal damages."

XVIII.

The court erred in refusing to give to the jury the defendant's requested instruction No. 7, as follows:

> "You are instructed that if you find from the evidence that the contracts between the plaintiff and the defendant have been assigned to the California Packers' Corporation or to any person other than the plaintiff, then you shall find for the defendant."

XIX.

The court erred in refusing to give to the jury the defendant's requested instruction No. 8, as follows:

> "You are requested to find for the defendant."

XX.

The court erred in giving to the jury the following instruction:

> "In this case there is only the question of the amount of the damages which is left to you. The question of who is entitled to recover on the findings and the evidence in this case was a question, as it turns out, for the court to decide, and the court decided on these contracts and in view of all the evidence, the plaintiffs are entitled to recover. It is left to you to say how much. At the very least plaintiffs would be entitled to nominal damages, which is one dollar. If, in your honest judgment, the plaintiffs have suffered substantial damages, it will be your duty to allow them whatever amount your judgment is."

XXI.

The court erred in giving the following instruction to the jury:

> "According to the contracts, as I understand them, no definite date of delivery is fixed in them. Consequently, the date of delivery would be any time that in your judgment would be a reasonable time after September 12, 1924, and, consequently, the damages to which plaintiffs would be entitled would be such as might be the difference in the price that it was to pay to the defendant and the market value of the goods in the same market during the interval of time. That is the rule of damages, the difference between what the buyer was to pay for the goods and what he could restore himself by going into the open market and buying the goods, what price he would have to pay. If the plaintiffs were to pay $2.50 a dozen for these goods, and if they could in the open market buy

the same goods for $2.50, of course they would not be damaged anything beyond mere nominal damages, which is one dollar, by reason of the breach of the contracts.

"On the other hand, if it was necessary for the plaintiffs to pay in the open market $2.65, $2.85, or $2.90 a dozen, the plaintiffs would be damaged the difference between $2.50 and the $2.85 or $2.90 they would have to pay on the open market."

XXII.

The court erred in giving the following instruction to the jury:

"Now, what was the market value, of course, is an issue for you to decide. For when you once determine what the market value is, you simply deduct from that the price that the plaintiffs were to pay, which will give you the amount of damage on each dozen. Mr. Hoffman, a member of the partnership, testified that at that time, September 12th to October 18, 1924, the price of like goods on the Pacific Coast —these goods are shipped by freight, and perhaps the price in one place would not be very much different from another—was $2.65 or $2.90 a dozen, which would be thirty-five or forty cents above the price that Hoffman and Greenlee were to pay to the defendants for the goods."

XXIII.

The court erred in giving the following instructions to the jury:

"The defendant presented in its behalf, the testimony of Mr. Ribbeck, a member of the company, who testified that in September, 1924, the

price was about $2.50 a dozen. How much more he does not say. From the standpoint that he is an interested party, you can draw the conclusion—though you are not bound to—that he did not mean anything less than $2.50. In other words, in the case of all interested witnesses you may consider whether they are not apt to draw the testimony just as favorably to themselves as they can, and, of course, as they deem it consistent with their oath. That would apply also to Mr. Hoffman and his testimony of $2.85 or $2.90 a dozen. Mr. Wright, also associated with the defendant, testified that the price during that time, September and October, and even to the first of 1925, was $2.50, and the highest was $2.65 a dozen cans. That at the very least is $2.65, which would be fifteen cents more than the plaintiffs were required to pay the defendant for the goods."

XXIV.

The court erred in receiving the verdict of the jury, which was contrary to the law and the evidence.

XXV.

The court erred in entering judgment against the defendant.

XXVI.

The court erred in overruling the motion of the defendant for a new trial.

ARGUMENT.

We will discuss the questions presented by the several assignments of error under the following heads:

I.

The court erred in permitting the defendants in error to introduce, in rebuttal, testimony which properly was a part of its case in chief.

II.

The court erred in admitting testimony concerning contracts, shipments, and controversies other than those involved in the case at bar.

III.

The court erred in commenting adversely on the testimony of Mr. Ribbeck.

IV.

The court erred in withdrawing the case from the jury except as to the question of damages.

V.

The defendants in error were not the real parties in interest.

VI.

The agreements for the sale of pears were executory agreements without present consideration, and lacking mutuality.

VII.

Even if there was a binding contract, there was no breach of the contract on the part of the plaintiff in error.

VIII.

The measure of damages, if any, is the difference between the contract price and the resale price.

I.

The court erred in permitting the Defendants in Error to introduce, in rebuttal, testimony which properly was a part of its case in chief.

The Defendants in Error, as a part of their case in chief, introduced testimony concerning the grade or quality of the pears submitted, and then after the defense had rested, they were permitted by the court, over objection to introduce further cumulative testimony on the same subjects.

"Rebutting evidence means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove." (Jones on Evidence (Third Edition) Sec. 809).

The evidence admitted does not meet this test. We may be asked: "How are you prejudiced." It is manifest from the decision and oral opinion of the trial judge (Tr. pp. 119, 120, 121) that he gave no consideration whatsoever to any testimony concerning the grade or quality of the pears, of which samples were furnished, inasmuch as he held that the buyer might reject merely on his "sense of taste" (Tr. p. 120). All errors as to testimony on this subject, might therefore be of no consequence, and ineffective for prejudice or otherwise in the

presence of the greater and determining error of holding that there was a binding contract where one party could thus reject a proffered performance.

However, the testimony on market value bears a different aspect. That, under the court's instructions, determined the amount of damages. The amount of damages was left to the jury. It was the only question left to the jury. Under this particular situation, the improper admission of market value testimony in rebuttal would tend naturally to a cumulative and concentrative effect on the jury, greatly to our prejudice.

II.

The court erred in admitting testimony concerning contracts, shipments and controversies other than those involved in the case at bar.

The testimony of R. G. Weston (Tr. p. 113) illustrates our point on this. He was permitted to testify concerning a shipment to London, and its condition on arrival there.

In the absence of proof that they were taken from the same lot, and that conditions of transportation and handling were similar, this is clearly incompetent.

III.

The court erred in commenting adversely on the testimony of Mr. Ribbeck.

The court in its instructions (Tr. p. 128) gave a prejudicial and strained construction and em-

phasis to the testimony of Mr. Ribbeck on market value. The court there says that Mr. Ribbeck testified that the market price was "about $2.50 a dozen. How much more he does not say." The court plainly gives the jury to understand that, because Mr. Ribbeck is identified with one of the parties to the action, they can, in effect, disregard his testimony; that his testimony does nothing more than fix a minimum, and that the market price might be any indefinite amount above that. The prejudicial emphasis and distinction in this instruction, may be more fully appreciated by comparing the comment on Mr. Ribbeck's testimony with the comment on similar testimony of Mr. Pratt for Defendants in Error. Mr. Pratt testified that the market price was "*about* $2.90 per dozen" (Tr. p. 69). The court in commenting to the jury on Mr. Pratt's testimony doesn't analyze or explain the meaning of about. The court merely discards or disregards the qualifying word and tells the jury that Mr. Pratt testified that these goods "were $2.90 a case" (Tr. pp. 127, 128).

Our conceptions of the term "about" is that it indicates an approximation and in case of market quotations a very close approximation. But conceding that, and conceding that the interest of a party is to be considered in weighing the evidence, was there fair justification for the distinction made in the instruction.

Furthermore, if the jury are advised of the interest of one witness, should it not likewise be

advised of the interest of the other witness whose testimony is compared with his. It is true that Mr. Ribbeck was the general manager of the Everett Fruit Products Co. (Tr. p. 77). But Mr. Pratt was the sales manager for the California Packing Corporation (Tr. p. 67) to whom the "contracts" had been assigned (Tr. pp. 89, 90), and yet that fact was not mentioned in the court's instructions, when the testimony of these two witnesses was thus compared.

IV.

The court erred in withdrawing the case from the jury except as to the question of damages.

We recognize that the Supreme Court has under certain circumstances sanctioned that procedure whereby, even in the absence of written stipulation the court on motion of both parties withdraws the case from the jury, and makes findings on the facts, and has reconciled such procedure with the provisions of Section 649, Rev. St. (1587, Com. St.). The case most frequently cited in support of such procedure is that of *Buetell vs. Magone,* 157 U. S. 154, 39 L. Ed. 654. The court there said:

> "The request, made to the court by each party to instruct the jury to render a verdict in his favor was not equivalent to a submission of the case to the court, without the intervention of a jury, within the intendment of sections 649, 700, Revised Statutes. As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed ques-

tion of fact which could operate to deflect or control the question of law."

The court also said in the course of its opinion:

"There was obviously no disputed question of fact."

We believe that all subsequent decisions citing this case have been uniform, in stating the effect of the rule subsequently in the language employed by the Supreme Court in *Empire State Cattle Company vs. Atchison, Topeka & Santa Fe Railway Company.* The court said:

"It was settled in *Beuttell vs. Magone, supra,* that where both parties request a peremptory instruction and *do nothing more, they thereby assume the facts to be undisputed,* and, in effect, submit to the trial judge the determination of the inferences proper to be drawn from them."

Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Railway Co., 52 L. Ed., 931, 936.

Mr. Justice White delivered the opinion of the court both in the case of *Beuttell vs. Magone* and the case of *Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Ry. Co.*

The scope and limitations of the rule are accurately stated in the well considered and leading case of *Minahan vs. Grand Trunk Western Railway Company,* 138 Fed. 37; *Empire State Cattle Co. vs. Atchison, T. & S. F. R. Co.,* 52 L. Ed. 931, 936.

In the *Minahan* case, *supra,* the court says:

"In that case (referring to *Beuttell vs. Magone*) there was *no disputed question of fact*

and it only remained for the court to state to the jury what the facts were, and what the law applicable to those facts was. And what the court there held in effect was that the court might state the facts as agreed, and not submit them to the jury. The language of Mr. Justice White, taken apart from the case before the court, might justify the conclusion which the counsel draws from it. But it would seem that the decision cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the parties whose request is refused has coupled with his request other requests directed to particular aspects of the case, which repel the implication that the party had consented to a submission of the facts to the court. And in all the cases in which the case of *Beuttell vs. Magone* has been cited in the appellate courts the conditions were the same; *there was no disputed question* of fact, and there were no special requests."

In the case of *Empire State Cattle Company* ***vs.*** *Atchison, Topeka & S. F. R. Co., supra,* the court adopted the following statement:

"A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted, facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to *then* ask for instructions submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right."

It seems to be the rule that before the court can pass upon the issues, there must be a request by both parties for a peremptory instruction upon *all* the issues in the case *without reservation.*

See

Michigan Copper & Brass Co. vs. Chicago Screw Co., 269 Fed. 502, 504.

The limitations and qualifications of the rule and the application thereof to a situation similar to the case at bar are further stated and illustrated in the following cases:

Charlotte National Bank of Charlotte, N. C., vs. Southern Railway Co., 179 Fed. 769;

Farmers' & Merchants' Bank vs. Maines, 183 Fed. 37;

Chesapeake & O. R. Co. vs. M'Kell, 209 Fed. 514;

Breakwater Company vs. Donovan, 218 Fed. 340;

Ewert vs. Fullerton, 225 Fed. 758;

Sampliner vs. Motion Picture Patents Co., 254 U. S. 233, 65 L. Ed. 240.

The cases hereinabove cited would appear to support our contention that before the court can withdraw the issues, or any of them, from the consideration of the jury, each and all of the following elements are essential, and must be present:

a. That both parties request a peremptory instruction *and do nothing more.*

b. That the request or submission must be upon *all the issues.*

c. That the request or submission must be *without any reservation.*

d. That there must be *no disputed question of fact.*

The underlying theory seems to be that where both parties join in a request for a directed verdict on all the issues in the case, without any reservation, and do nothing more, they thereby evidence an intention or desire that the court withdraw all issues from the jury, and, in effect, stipulate that the issues may be determined by the court.

In the case at bar, we respectfully submit that the court upon denying the defendant's motion should have submitted the case to the jury.

We respectfully submit that the case at bar is not one where both parties joined in a request for peremptory instruction on all the issues, and did nothing more.

What was done by counsel for Plaintiff in Error, and what was done by counsel for Defendants in Error? Counsel for Plaintiff in Error asked for a directed verdict upon three expressly stated grounds or issues, as hereinabove shown. These stated grounds did not include the issue of the quality or grade of the samples furnished, or the issue of the good faith of the Defendants in Error in rejecting the samples, or the issue of the market price of pears. By such omission, these issues were, therefore, excluded from the consideration of the

court. The Plaintiff in Error by this motion did not say in legal effect or otherwise to the court that there were no disputed questions of fact in the case, or that it desired the court to find all the facts in the case. On the contrary, the Plaintiff in Error in and by its motion said, in effect:

> (1) "The evidence is undisputed that the contracts have been assigned by the plaintiffs. From this undisputed fact we ask your honor to draw the inference of law that the plaintiffs are not the real parties in interest and that on this ground the defendant should prevail."
>
> (2) "It is an undisputed fact that the pears were resold and there is no evidence that the resale price was higher than the contract price. We, therefore, ask your honor to draw the legal conclusion that no damage is shown and that plaintiffs are entitled to recover nothing."
>
> (3) "The execution of the written agreements and the terms and covenants thereof are undisputed. We ask your honor to determine as a matter of law that these agreements are lacking in mutuality, impose no legal obligation on the defendant and afford no ground for action by the plaintiffs."

Paraphrasing the opinion in *Empire State Cattle Co. vs. Atchison, T. & S. F. R. Co., supra,* we believed that any one of the foregoing facts, covered in our motion, which said facts were proved without conflict or dispute, entitled us to a verdict. But there was evidence of other, but controverted, facts (the quality or grade of the pears submitted, the good faith of the Defendants in Error in rejecting, and the market price of pears) which, if proven to

the satisfaction of the jury entitled us to a verdict, regardless of the evidence on which we relied in the first place.

In addition to the foregoing, special instructions were requested by the Plaintiff in Error (Tr. pp. 121-125). These considerations are sufficient, we contend, to entitle us to a jury trial.

Our position is re-enforced when we consider, in the light of the decisions, what action was taken by counsel of Defendants in Error in asking a directed verdict. In his request counsel for Defendants in Error expressly excepted the question of damages from those issues which we asked the court to pass upon. This reservation stops the request short of that point where it might operate to take the case from the jury. With this express exception incorporated in and as a part of the motion of the Defendants in Error, can it be said that

> "Both parties request a peremptory instruction and do nothing more,"

or that the request is without reservation, or that the request is for the court to find upon *all* the issues, or that there is no undisputed fact? The mere statement of the question presents the obvious answer. Can it be said that the request of Defendants in Error embodying such an exception constitutes in any legal or proper sense a joinder in the motion of Plaintiff in Error, or any implied stipulation or joint waiver? We contend that it does not. If a joinder by both parties in a motion for directed verdict, implies in effect any stipulation, any joint

waiver, any joint request or action of any kind, then the minds of both parties must have met and joined. An absolute request by one and a qualified request by the other party, or two qualified requests or requests with differing reservations would not constitute such joinder. As in offer and acceptance, the latter to be effective cannot vary the terms of the offer. It may well be that one party might be willing to have all the issues submitted to the court, but wholly unwilling to have the court pass upon a part only of the issues with the remaining questions left to the jury. Counsel for Defendants in Error might have asked the court to pass on the question of damages and leave all other issues to the jury, or might have asked the court to determine whether the contracts had been assigned and leave all other issues to the jury, or might have asked for any manner of segregation and distribution of some issues to the court and others to the jury. Such course would be on a parity with that pursued here, and in no sense could properly be termed a joinder in the motion of Plaintiff in Error. We are not aware of any case which holds that a motion with such reservation as here employed will effect a joinder to lift the case from the jury, even for the determination of those issues which the court is asked to pass upon.

V.

The Defendants in Error Were Not the Real Parties in Interest.

It appeared from the testimony of W. B. Longwell, a witness for the Defendants in Error, that the Defendants in Error had assigned to the California Packing Corporation its contracts with the Plaintiff in Error, and that the California Packing Corporation became the owner of said contracts by assignment. This testimony was not contradicted.

The same witness testified that he had inspected the pears as the agent of the California Packing Corporation, the owner of the contracts (Tr. p. 100). The rule is that actions must be brought in the name of the party whose legal right has been invaded.

Simpkins Federal Practice (Rev. Ed.), page 17.

But where the State prescribes who shall be made parties plaintiff or defendant in any cause cognizable at law, the Federal Courts will conform to the State code or rule.

Simpkins Federal Practice, page 17;

Albany & Rensselaer Iron and Steel Co. vs. Lundberg, 121 U. S. 451, 30 L. Ed. 982.

The Washington code provides that:

"Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law."

Remington's Compiled Statutes of Washington, Section 179.

From the testimony of the witness Longwell, it appears that the contracts had been assigned, and were in the ownership of the assignee at the time they were breached (if they were breached), and that any right, therefore, which had been invaded was the right of the assignee, and any damage suffered was suffered by such assignee. The action, therefore, could only be brought by the assignee, and Defendants in Error in this action are not entitled to bring or maintain this action.

VI.

The agreements for the sale of pears were executory agreements without present consideration, and lacking mutuality.

The parties agreed for the sale of pears *subject to approval of sample*. There was no consideration unless it was that of a promise for a promise. In effect, the promise of the plaintiffs to buy was conditioned upon their approval of the sample. The promise of the defendant to sell was conditioned upon the plaintiffs' approving the sample and ordering delivery. The plaintiffs were not bound. There was, therefore, a lack of mutuality, and consequently the defendant was not bound.

> "Mutuality of obligation is an essential element of every enforceable agreement. Mutuality is absent when one only of the contracting parties is bound to perform and the rights of the parties exist at the option of one only."
>
> 13 C. J., Sec. 179, pages 331 and 332.

This rule has been adhered to in the following recent Federal cases:

Hind, Rolph & Co. vs. Bertaut & Co., 9 Fed. (2d) 191;

Texarkana Casket Co. vs. Binswanger & Co. of Tennessee, 3 Fed. (2d) 611;

Nebraska Gas & Electric Co. vs. City of Stromsburg, 2 Fed. (2d) 518;

City of Pocatello vs. Fidelity & Deposit Co. of Maryland, 267 Fed. 181 (9th Cir.).

"Where the parties assume to make a contract in which a promise is the consideration for a promise, and the alleged contract so worded that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise * * * . This is what is often meant by saying that promises must be mutual."

Page on Contracts, 2d Ed., Sec. 569, page 963.

The principle is fundamental and has found application in numberless cases. In the State of Washington, it has been held that

" * * * if the option be given without consideration, it may be withdrawn at any time prior to its acceptance and a tender of performance, but not thereafter, as such acceptance will convert it into a bilateral or mutual contract, binding upon both parties."

Baker vs. Shaw, 68 Wash. 99, 103.

In Montana, it has been held that

"An agreement to sell wheat which contained no promise of the buyer to accept and where no consideration was paid, is not a binding contract."

McCaull-Webster Elevator Co. vs. Root, 201 Pac. 319.

By the Circuit Court of Appeals, Ninth Circuit, it has been held that a contract obligating one of the parties to sell to the other in case the latter chose to buy was void for want of mutuality.

> "The right of the defendant to buy only in the event it should chose to do so manifestly imposed no obligation on it to do so."
>
> *Long Syrup Refining Co. vs. Corn Products Refining Co.*, 193 Fed. 929, 931.

Executory agreements for sale where the quantity to be ordered was conditioned by the will, wish, or want of one of the parties have been held void for lack of mutuality.

> *Hazelhurst Lumber Co. vs. Mercantile Lumber & Supply Co.*, 166 Fed. 191;
>
> *Cold Blast Transportation Co. vs. Kansas City Bolt & Nut Co.*, 114 Fed. 77;
>
> *Willard, Sutherland & Co. vs. United States*, 262 U. S. 489; 67 L. Ed. 1086.

The courts have frequently been called upon to construe agreements in which one party undertakes to perform a service or deliver an article to the satisfaction of the other party. It is said that these agreements

> "are ordinarily divided into two classes: (1) Where fancy, taste, sensibility, or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility. In contracts involving matters of fancy, or judgment, when one party agrees to perform to the satisfaction of the other, he

renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such a party should have been satisfied where he asserts that he is not."

13 C. J., Sec. 768, page 675.

"The rule stated in the preceding section is also applied to cases of operative fitness or mechanical utility when the contract clearly provides, that performance shall be satisfactory to the promisor."

13 C. J., Sec. 769, page 676;

McDougall vs. O'Connell, 72 Wash. 349, 131 Pac. 204;

Tatum vs. Geist, 46 Wash. 226, 89 Pac. 547.

The Supreme Court of the State of Washington has adopted the following phraseology of the rule:

"And where there is an agreement that an act shall be done in a manner satisfactory to the promisee, it is generally held that he is the *sole arbiter* of the performance according to the agreement. *It is not enough to show that the promisee ought to be satisfied* and that his discontent is without reason."

McDougall vs. O'Connell, 72 Wash. 349;

Tatum vs. Geist, 46 Wash. 226.

The Circuit Court of Appeals has followed the same rule where a New York contract was involved.

American Music Store vs. Kussel, 232 Fed. 306, 310, 317.

" 'Satisfactory' in cases of the character under consideration means satisfactory to the promisor, if the contract is silent as to the person to whom the work, etc., shall be satisfactory."

13 C. J., Sec. 769, pages 676, 677.

Under the particular agreements here involved were the Defendants in Error made the "sole arbiters of performance according to the agreement"? We contend that they were so constituted, and that their dissatisfaction could not be brushed aside upon any ground that they "ought to be satisfied." Such being their right to bind or loosen themselves, they were under no obligation which could give rise to any corresponding obligation on the part of the Plaintiff in Error. The promises were illusory, or conditional. There was no mutuality and no valid contract.

What was the purpose of inserting the provision "subject to approval of sample" and what interpretation is to be placed on that phrase? This is not a situation, apparently, where the buyer merely claims a right to inspect the goods to determine whether they conform to the sub-standard grade. He would have that right if the phrase were omitted and the contract silent on the subject.

> "As a general rule in the case of an executory contract of sale the buyer is entitled to a fair opportunity to inspect or examine the article or commodity tendered to see if it conforms to the contract and if it does not do so to reject it. * * * It is the general rule that where goods are ordered of a specific quality, which the seller undertakes to deliver to a carrier to be forwarded to the buyer at a distant place, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination; in such a case the carrier is not the agent of the buyer to accept

> the goods as corresponding with the contract, although he may be his agent to receive and transport them."
>
> 23 R. C. L., Sec. 256, pages 1432, 1433.

It appears, therefore, that the phrase must have been inserted to confer some additional right on the buyers. Even if the fruit was of sub-standard grade, yet the buyers could require something further of it. That something further was a matter, or quality, or condition known only to the buyers and subject wholly to their determination. It was a matter beyond the control of the seller. This further something might be a matter of the buyers' taste, or a matter of their judgment of the commercial suitability of the article for their particular trade or custom. The reason of determination is immaterial, so long as the act of determination is left solely to the buyers.

The court may observe the following provision in the agreement:

> "buyers' option labels, less usual label allowance" (Tr. p. 63).

From this we infer that the buyers contemplated the possibility of putting these goods on the market either under their own labels, or under some label other than that of the seller, and, in that event, to save themselves a duplicate cost of labels. The buyers might desire either to create or sustain a market for a commodity under a particular label; and to that end they might desire to put forth only a very superior quality within the grade, or only

a particular kind of fruit within the grade, that might appeal to some particular fancy or taste. The fruit may have been intended for domestic consumption, or perhaps for foreign consumption. The foreign consumer might like his pears hard, or firm or soft. He might like big pieces or little pieces, thick syrup or thin, some particular flavor or some other flavor. And under the terms of these agreements the buyers could have rejected any samples for any one of the foregoing or similar reasons, even though up to the grade of sub-standard pears, and the seller could not legally question his decision.

The trial court seemed to be of the opinion that the buyers had such a latitude and such a privilege, when the following expressions were employed in the oral opinion:

> "The defendant was to furnish pears of the grade for which he had contracted, and the plaintiffs to take those pears providing they were of that grade *and approved even as it might be to his sense of taste"* (Tr. pp. 119-120).

While it is true that the trial court further said that:

> " * * * he is obliged to act in good faith and have motives of honesty and justice to the other party" (Tr. 120),

yet the mere fact that he must act honestly would not deprive him of his own standard, of his own taste or fancy, and would not subject the buyers' decision to the test of whether it was reasonable or whether he ought to be satisfied. The oral opinion continues the statement hereinabove last quoted, as follows:

> "He still has a right to say there is that in the fruit that does not meet his approval * * * " (Tr. p. 120).

And again in the opinion we find:

> "In respect to the sample. The contract contained the term 'subject to approval of sample.' A party who contracts in that fashion *leaves the question of approval entirely to the other party*" (Tr. p. 120).

This conclusion is in close harmony with the authorities.

And since the question of approval is left entirely to the buyer, he is not obligated to accept samples tendered, even though of sub-standard grade, and the seller is without redress for the refusal. The buyer is not bound until he says:

"These samples are satisfactory, deliver the pears." Up to that point the buyer has an option. That option is based on no consideration. Until that option is exercised the seller is not bound.

In many cases, the plaintiff seller has been denied recovery of the purchase price, because the goods were not satisfactory to the defendant buyer. But we are not aware of any case where the buyer, who was to be the sole arbiter of performance, was held to have a right of action against the seller for failure to deliver.

> "While, however, the dissatisfaction of the promisor entitles him to refuse payment or performance on his part, it does not entitle him to require the promisee to continue to endeavor to perform until he is satisfied, under penalty in case he ceases such effort of being liable for a breach."

13 C. J., Sec. 768, page 676.

> "In the case of a sale of goods to be accepted or paid for, if 'satisfactory,' the condition is a suspensory one, that is, it suspends the obligation of both parties until the purchasers satisfaction is gained or waived. Hence the fact that the goods are not satisfactory does not give him a right to reject them and claim damages for breach of contract of the seller, as would be the case if there were a warranty that the goods were fit for the purpose and they were not, nor to keep them and recover damages in an action for the purchase price."

9 Cyc. 624.

The application of the rule is well illustrated in an Illinois action brought by the buyer on a contract involving the identical principle here involved.

> *Joliet Bottling Co. vs. Joliet Citizens Brewing Co.,* 98 N. E. 263, 265 (Ill.).

Under the written agreement in that case, the Brewing Company was to brew a special beer, and the Bottling Company was to bottle said beer as long as it was of "satisfactory quality" and to pay a stipulated price therefor to the Brewing Company. In the course of performance of the contract, the beer furnished failed in quality, and was not satisfactory to the Bottling Company, which company thereupon secured beer from other sources at great expense and loss of profits. The Bottling Company brought its action against the Brewing Company for damages for breach of contract, setting forth the foregoing facts in its declaration.

The court in affirming the judgment of the lower court sustaining a demurrer to the declaration, said:

> "The quality of the beer was to be satisfactory to appellant (the Bottling Co.). Under this provision of the agreement, appellant had the option of refusing to accept beer from appellees at its pleasure upon the ground that it was not satisfactory. *Brown vs. Foster,* 113 Mass. 136, 18 Am. Rep. 463; *Zaleski vs. Clark,* 44 Conn. 218, 26 Am. Rep. 446; *Gibson vs. Granage,* 39 Mich. 49, 33 Am. Rep. 351. It cannot be doubted, we think, that the contract was unilateral and void for want of mutuality under repeated decisions of this and other courts. *Vogel vs. Pehoc,* 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *Higby vs. Rust,* 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204; *Bailey vs. Austrian,* 19 Minn. 535 (Gil. 465); *Crane vs. Crane Co.,* 105 Fed. 869, 45 C. C. A. 96; *Davis vs. Lumbermen's Mining Co.,* 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357."

VII.

Even if there was a binding contract, there was no breach of the contract on the part of the Plaintiff in Error.

For the reasons herein above set forth, it would seem that there is no legal escape from the conclusion that the agreements sued upon are void for want of mutuality. If, however, the court should arrive at a different conclusion and find that there was a binding agreement, under any construction of the agreement the only promise on the part of the seller would be that it would submit samples

of sub-standard pears of the 1924 pack and if approved by the buyer would deliver the quantity of pears provided for in the agreement. The promise upon the part of the buyer would be that they would inspect the samples submitted and approve or reject the sample, and if approved would accept the quantity of pears provided for in the agreement. The seller submitted samples of its sub-standard pears of its 1924 pack and such samples were inspected by the buyer and rejected. There is no evidence that the goods were not of the sub-standard grade as packed by the seller. The agreement provided and the complaint specifically alleged that the samples to be submitted by the Plaintiff in Error were to be of the sub-standard grade as packed by the Plaintiff in Error for 1924. So when the Plaintiff in Error had submitted samples of this grade of the pack for that year and permitted inspection of such samples at its plant it had performed all of its obligations unless and until the samples submitted were approved by the buyer. The trial court did not determine that the samples submitted or inspected were not of the sub-standard grade as packed by the seller for the year 1924; and it did not determine that such samples were not of the sub-standard grade as established by the Northwest Canners Association, and the jury did not pass upon this question. So that question has never been determined. In the case of *Hurley Mason Co. vs. Stebbins, Walker & S.*, 79 Wash. p. 366, 140 Pac. 381, there was involved a sale of cement subject to

tests. The court at page 373 in discussing the provisions of the contract stated:

> "II. Was the provision that the sale was subject to the tests a warranty collateral to the contract, or was it a condition of the contract? The respondent contends that it was a warranty of quality. We do not so construe it. The sale was made 'subject to' the tests. If an inferior article was shipped, the respondent had a reasonable time for inspection and test, and an acceptance or refusal to accept. The sale being subject to the tests, if the material delivered did not meet the tests, then there was to be no sale."

In this case even assuming there was a binding contract the pears were sold subject to approval of sample. Samples were submitted and rejected and it follows that there was no sale and no breach of the agreement on the part of the Plaintiff in Error.

VIII.

The measure of damages, if any, is the difference between the contract price and the resale price.

Witness Longwell testified that the contract had been assigned by the plaintiffs to the California Packing Corporation, which thereupon became the owner of the contracts (Tr. p. 102).

Roy L. Pratt, a witness for the Defendants in Error, testified that the pears represented by the contracts involved in this case were purchased by the California Packing Corporation from Hoffman & Greenlee (Tr. p. 69).

Oscar Hoffman, senior partner of Hoffman & Greenlee, and a witness for the Defendants in Error, testified that the California Packing Corporation bought said pears from Hoffman & Greenlee

> *"under the same terms and conditions as far as quality is concerned under which I purchased them from the Everett Fruit Products Company"* (Tr. p. 67).

There was no testimony to show what the price was on the re-sale by the Defendants in Error to the California Packing Corporation or what the profits would have been.

While the general rule is that where the breach consists in the failure of the seller to deliver the goods sold, the measure of damages is ordinarily the difference between the contract price and the market price, yet where the goods are sold to be re-sold, the measure of damages for non-delivery is the expected profits.

Keen vs. Swanson, 129 Wash. 269.

While it is true that the original purchaser might have a special damage by reason of the persons to whom he sold holding him liable for the losses, yet he could not recover such special damage if he neither pleads nor seeks to recover damage of such character.

Keen vs. Swanson, 129 Wash. 269, 273.

In the case at bar, the resale was shown by the evidence, but there was no testimony of any kind to

indicate the price at which such resale was made or the profits, if any, which had been made through such resale. Neither do the Defendants in Error plead or prove any special damages for their failure to deliver to their assignee under the resale. There is no testimony to show that they incurred any liability by such failure to deliver, and, in fact, the testimony of Mr. Hoffman (Tr. p. 67) indicates that the re-sale or assignment was the same sort of a conditional resale as the original agreement made by the Plaintiff in Error. Mr. Hoffman said that the California Packing Corporation bought the pears under the same terms and conditions, as far as quality was concerned, as he purchased them from Plaintiff in Error. Before the Defendants in Error could establish special damages, it would be necessary to establish that they had been unconditionally bound to the resale purchaser, and had incurred a liability. We contend, therefore, that no special damage is shown, and that no damage was shown by way of loss of profits, which should be the true measure in a case of this sort, and that, therefore, the Defendants in Error failed to establish any damages whatsoever.

WHEREFORE, Plaintiff in Error respectfully urges that the judgment of the trial court be reversed and that judgment in favor of the Plaintiff in Error dismissing the action be directed and entered, or in the alternative that the judgment of the trial court be reversed and a new trial granted.

WILLIAMS & DAVIS,
REAMES & MOORE,
Attorneys for Plaintiff in Error.